

MAY 12,00

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Ryan

Opposition No. 106,462

Anheuser-Busch,
Incorporated

v.

Coyote Springs Brewing Company

Before Sams, Simms, and Bottorff, Administrative Trademark
Judges.

By the Board:

Coyote Springs Brewing Co. has filed an application to
register the mark COYOTE SPRINGS BREWING COMPANY in the



following form:

for "restaurant services including a brew pub" in class 42.¹
Anheuser-Busch, Incorporated filed a notice of opposition,
alleging, *inter alia*, that registration of applicant's mark is
barred under Trademark Act §2(d), 15 U.S.C. §1052(d). As
grounds for the opposition, opposer claims ownership of federal

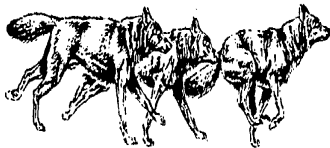
¹ Application Serial No. 74/632,276, filed February 9, 1995.

registrations for "beer" in class 32 for the marks NORDIK WOLF in stylized form and with a wolf design element, RED WOLF in typed form and with a wolf design element, and a wolf design



mark and asserts likelihood of confusion with those marks.²

Opposer's special form marks are shown below.



Applicant answered, denying the salient allegations in the

NORDIK WOLF

² In the notice of opposition, opposer pleads the following 5 registrations: U.S. Reg. Nos. 1,401,473(NORDIK WOLF), 1,544,767 (NORDIK WOLF & Design), 2,013,060 (RED WOLF), 1,975,844 (RED WOLF and wolf design), and 1,961,885 (Design of wolf pack).

notice of opposition.

This case now comes up for consideration of applicant's December 18, 1997 motion for summary judgment, wherein applicant submits that there is no likelihood of confusion under Section 2(d). The motion for summary judgment has been fully briefed and the Board has considered all the parties' arguments and evidentiary submissions.³

In its summary judgment motion, applicant argues that confusion is not likely because of the dissimilarity of the parties' marks. Applicant contends that it is entitled to summary judgment in its favor because there are no genuine issues of material fact in this case. In support of its motion, applicant submits copies of the involved marks, including status and title copies of opposer's pleaded registrations. With applicant's reply brief, applicant further submits a declaration of William A. Garrard, Jr., applicant's president, attesting to the use and promotion of applicant's COYOTE SPRINGS mark in connection with applicant's restaurants.

Opposer disputes applicant's contentions. In opposer's May 26, 1998 response, opposer argues that applicant has not met its summary judgment burden of establishing the absence of any genuine issues of material fact. Opposer contends that the overall commercial impression created by the marks of the parties is the same, taking into consideration opposer's combined use of its alleged family of marks and the strength of those marks. Opposer asserts that the similarity of the

parties' goods and services, the similarity of the channels of trade for the parties' goods and services, and the degree of care exercised in purchasing the parties' products and services must also be taken under consideration in determining likelihood of confusion.

Opposer introduces the declarations of Ann Proscino, opposer's New Products Brand Manager, and Meyer Moussa, Vice President of a beer distributing company, both in support of opposer's view that opposer's marks are strong and entitled to broad protection. A declaration of opposer's counsel was also submitted for consideration herein, attaching a dictionary definition of the term "coyote", copies of applicant's advertisements, and a photocopy of opposer's NORDIK WOLF design mark on its goods.

The purpose of summary judgment is to avoid an unnecessary trial where additional evidence would not reasonably be expected to change the outcome. *See Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 730 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984). See also TBMP §528.01 and cases cited therein.

Generally, summary judgment is appropriate in cases where the moving party establishes that there are no genuine issues of material fact which require resolution at trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is material when its resolution would affect the outcome of the proceeding under governing law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); and

³ We **grant** applicant's June 15, 1998 motion for leave to file a reply brief and

Octocom Systems Inc. v. Houston Computers Services, Inc., 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990). A fact is genuinely in dispute if the evidence of record is such that a reasonable factfinder could return a verdict in favor of the nonmoving party. *Id.*

Furthermore, in deciding a motion for summary judgment, the Board may not resolve an issue of fact; it may only determine whether a genuine issue of material fact exists. See *Meyers v. Brooks Shoe Inc.*, 912 F.2d 1459, 16 USPQ2d 1055 (Fed. Cir. 1990). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

In determining whether there is a likelihood of confusion between the marks, there are thirteen evidentiary factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). When any factor has been shown to be material or relevant in the particular case, and evidence has been introduced on such factors, then those factors must be considered by the Board. See *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 16 USPQ2d at 1788.

Based on the record now before us and for the reasons discussed below, we must conclude that summary judgment is appropriate in this case. Applicant has adequately met its burden of proof for establishing its entitlement to summary judgment. We find the circumstances here are similar to those in *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in that the single *du Pont* factor of the similarity or dissimilarity of the marks in their entirety totally outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion.

In considering the similarities and dissimilarities of the parties' marks, we evaluate among other things the visual appearance and sound of the parties' marks. Nowhere in applicant's mark do we see the terms "nordic", "wolf", or "red", or their phonetic equivalents. Nor do we find the wording "coyote" or "springs" anywhere in opposer's marks. In comparing the design elements in the parties' marks, we find that the differences outnumber and outweigh the similarities. The graphic elements in each of the parties' design marks are very different and very distinctive in styling. Common usage of an animal (or animals) of canine variety in the parties' marks and a banner element is not enough to render the marks similar in their entirety.

Opposer's marks not only differ greatly in appearance and sound from applicant's composite mark, but also convey a much different commercial impression. COYOTE SPRINGS has a

completely distinct connotation from NORDIK WOLF or RED WOLF, even though the design elements of both parties' marks may refer to, or depict an animal of canine variety. It is our view that the wording COYOTE SPRINGS, in conjunction with a depiction of scenery showing a coyote and a stream, projects the connotation of a geographic location, real or fictional. This is to be distinguished from the connotation of opposer's marks, each of which denote a type of wolf, i.e., a wolf that is red, or a wolf from Scandinavia or characteristic of wolves that may be from Scandinavia.⁴

Based on the evidence of record, we conclude that the parties' marks do not look alike, do not sound alike, and do not convey similar meanings. It is our view that the *du Pont* factor as to the similarities and dissimilarities of the parties' marks weighs heavily in favor of applicant.

Applicant generally questions the sufficiency of evidence in support of opposer's arguments that the parties' goods and services are related,⁵ that the channels of trade for the

⁴ Upon consideration of the meaning of the term NORDIK, the Board takes judicial notice of the meaning of the phonetically equivalent term NORDIC. The adjective form of the term "**Nor•dic**" (nôr'dîk) is defined as:

Of, relating to, or characteristic of Scandinavia or its peoples, languages, or cultures. . . .

See *The American Heritage® Dictionary of the English Language, Third Edition* copyright © 1992 by Houghton Mifflin Company.

⁵ The record includes evidence that applicant's restaurant features goods identical to those of opposer, namely, beer. We observe attached to opposer's response brief were advertisements for applicant's services showing applicant's mark used in connection with the sale of beer and "handcrafted ales and lagers, brewed on [the] premises."

parties' goods and services are similar, and that the degree of care exercised by consumers of the parties' goods and services is low. For purposes of summary judgment, we weigh these factors in favor of opposer inasmuch as all disputed issues of fact must be resolved in the light most favorable to opposer as the nonmoving party.

The Board observes that no factual inference can be drawn from opposer's conclusory statements that opposer owns a family of "wolf" marks. The fact that opposer owns several marks sharing a common word or design element is not enough to establish a family of "wolf" marks. Although opposer's evidence of a large volume of sales and large advertising expenditures under its NORDIK WOLF and RED WOLF marks support opposer's contention that its "wolf" marks are strong, there is no evidence that these marks were promoted together as a family, or that opposer separately promoted the common "wolf" element, either in design or print forms. *See J & J Snack Foods Corp. v. McDonald's Corp.*, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). Accordingly, there can be no genuine issue of material fact as to the existence of a family of "wolf" marks because there is no evidence of record from which we might reasonably infer the existence of such a family of marks.

Even assuming that all other *du Pont* factors weigh in opposer's favor, we find the dissimilarities in the marks, when viewed in their entirety, are so marked that no likelihood of confusion exists. Applicant's motion for summary judgment is

granted. See Fed. R. Civ. P. 56(c). The opposition is hereby dismissed with prejudice.

J. D. Sams

R. L. Simms

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board